

IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE

Assigned on Briefs January 23, 2009

IN RE N.J.S. AND M.A.S.

Appeal from the Juvenile Court for Davidson County
No. PT77090; 2006-000834; 2005-002231 Betty K. Adams, Judge

No. M2008-01694-COA-R3-PT - Filed July 24, 2009

Mother appeals the termination of her parental rights to two children, asserting that the Department of Children's Services failed to exercise reasonable efforts to reunite her with the children and that the trial court erred in finding that she abandoned the children. We affirm the judgment of the trial court.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Juvenile Court Affirmed

RICHARD H. DINKINS, J., delivered the opinion of the court, in which PATRICIA J. COTTRELL, P. J., M. S., and FRANK G. CLEMENT, JR., J., joined.

Thomas H. Miller, Nashville, Tennessee, for the appellant, V.L.S.¹

Robert E. Cooper, Attorney General and Reporter, and Amy T. McConnell, Assistant Attorney General, Nashville, Tennessee, for the appellee, State of Tennessee, Department of Children's Services.

OPINION

I. Factual and Procedural Background

This appeal involves the termination of parental rights to two children. The older child, N.J.S., born on June 16, 2004, came into custody of the Department of Children's Services ("DCS") in March 2006 as a result of being hospitalized following his ingestion of methamphetamine, ecstasy and cocaine while in the custody of Mother's relatives; the relatives were arrested and charged with various drug offenses. The younger child, M.A.S., born on August 11, 2005, likewise came into DCS custody in March 2006 after having been left by her custodian with the same relatives with

¹ The initials of Mother are used to avoid identification of the identities of the children who are the subject of this proceeding.

whom N.J.S. was residing at the time of his hospitalization.² At the time of the children's placement into DCS custody, Mother was incarcerated for a probation violation arising out of a drug-related conviction.

N.J.S. and M.A.S. were determined to be dependent and neglected and retained in foster care. An initial permanency plan³ was developed with the goal of reunification with Mother or exit custody to live with relatives. The permanency plan required Mother to submit to an alcohol and drug assessment and follow any recommendations; undergo random drug screens; follow the terms of her probation and not incur any further criminal charges; enroll in counseling sessions to address "her grief and loss issues, her sexual victimization issues from her past, separation from her children, and from being a foster child herself"; and to undergo a parenting assessment and follow its recommendations. The plan was approved by the court on April 28, 2006.

The permanency plans were revised in January 2007 and approved by the court on February 2, 2007. The goal was modified to "reunification with parent or adoption" and a target date of December 21, 2007 set. The plan noted that Mother's repeated incarcerations were making it difficult for her to complete the tasks assigned to her in the plan and that she was attending an alcohol and drug program where she was incarcerated.

DCS initiated this action on August 31, 2007, seeking termination of the parental rights of Mother and the fathers of the two children.⁴ As respects Mother, the petition alleged as grounds for termination: abandonment pursuant to Tenn. Code Ann. §§ 36-1-113(g)(1) and 102(1)(A)(iv); non-compliance with the permanency plan pursuant to Tenn. Code Ann. § 36-1-113(g)(2); persistence of conditions pursuant to Tenn. Code Ann. § 36-1-113(g)(3); and that termination was in the best interest of the children. Following a hearing, the court entered an order terminating Mother's parental rights on the specified grounds of abandonment, substantial noncompliance with the permanency plan, persistence of conditions and finding that termination was in the best interest of the children. Mother appeals, raising as issues whether DCS exercised reasonable efforts to reunite her with the children after they were placed in foster care and whether the trial court erred in finding that Mother abandoned the children.

I. Standard of Review

A parent has a fundamental right to the care, custody, and control of his or her child. *Stanley v. Illinois*, 405 U.S. 645, 651 (1972); *Nash-Putnam v. McCloud*, 921 S.W.2d 170, 174 (Tenn. 1996).

² M.A.S. was born on a street at 5:00 in the morning. When taken to the hospital following the child's birth, Mother and M.A.S. tested positive for cocaine. A petition for custody and emergency removal was filed by DCS on August 19, 2005, and custody of the child given to Mother's cousin.

³ Plans were separately developed for each child but, as the requirements of the plans imposed on Mother were substantially the same, the plans will not be differentiated in this opinion.

⁴ The terminations of the parental rights of the fathers of the children are not at issue in this appeal.

Thus, the state may interfere with parental rights only if there is a compelling state interest. *Nash-Putnam*, 921 S.W.2d at 174-75 (citing *Santosky v. Kramer*, 455 U.S. 745 (1982)). Our termination statutes identify “those situations in which the state’s interest in the welfare of a child justifies interference with a parent’s constitutional rights by setting forth grounds on which termination proceedings can be brought.” *In re W.B.*, 2005 WL 1021618, at *7 (citing Tenn. Code Ann. § 36-1-113(g)). A person seeking to terminate parental rights must prove both the existence of one of the statutory grounds for termination and that termination is in the child’s best interest. *In re D.L.B.*, 118 S.W.3d 360, 367 (Tenn. 2003); *In re Valentine*, 79 S.W.3d 539, 546 (Tenn. 2002); Tenn. Code Ann. § 36-1-113(c).

Because of the fundamental nature of the parent’s rights and the grave consequences of the termination of those rights, courts must require a higher standard of proof in deciding termination cases. *Santosky*, 455 U.S. at 769; *Matter of M.W.A., Jr.*, 980 S.W.2d 620, 622 (Tenn. Ct. App. 1998). Thus, both the grounds for termination and the best interest inquiry must be established by clear and convincing evidence. Tenn. Code Ann. § 36-3-113(c)(1); *In re Valentine*, 79 S.W.3d at 546. Clear and convincing evidence “establishes that the truth of the facts asserted is highly probable . . . and eliminates any serious or substantial doubt about correctness of the conclusions drawn from the evidence.” *In re M.J.B.*, 140 S.W.3d 643, 653 (Tenn. Ct. App. 2004). Such evidence “produces in a fact-finder’s mind a firm belief or conviction regarding the truth of the facts sought to be established.” *Id.* at 653.

In light of the heightened standard of proof in these cases, a reviewing court must adapt the customary standard of review set forth by Tenn. R. App. P. 13(d). *In re M.J.B.*, 140 S.W.3d at 654. As to the court’s findings of fact, our review is *de novo* with a presumption of correctness unless the evidence preponderates otherwise, in accordance with Tenn. R. App. P. 13(d). *Id.* We must then determine whether the facts, as found by the trial court or as supported by the preponderance of the evidence, clearly and convincingly establish the elements necessary to terminate parental rights. *Id.*

II. Discussion

A. DCS’ Efforts

Mother does not contend that the requirements of the permanency plan were not reasonable or related to the circumstances giving rise to the children’s removal; likewise, she does not contest the court’s finding that she failed to substantially comply with the plan requirements. Rather, she asserts that DCS did not exercise reasonable efforts to reunify her with her children. This contention is without merit.

Termination on the ground of substantial noncompliance with the permanency plan implicates DCS’ obligation to demonstrate that it made reasonable efforts to reunite a child with the parent. Tenn. Code Ann. § 37-1-166(b). Reasonable efforts are statutorily defined as the “exercise of reasonable care and diligence by the department to provide services related to meeting the needs of the child and family.” Tenn. Code. Ann. § 37-1-166(g)(1). The factors courts are to use in

determining reasonableness include: (1) the reasons for separating the parents from their children; (2) the parents' physical and mental abilities; (3) the resources available to the parents; (4) the parents' efforts to remedy the conditions that required the removal of the children; (5) the resources available to the Department; (6) the duration and extent of the parents' efforts to address the problems that caused the children's removal; and (7) the closeness of the fit between the conditions that led to the initial removal of the children, the requirements of the permanency plan, and the Department's efforts. *In re Tiffany B.*, 228 S.W.3d 148, 158-59 (Tenn. Ct. App. 2007) (citing *In re Giorgianna H.*, 205 S.W.3d 508, 519). The reasonableness of the Department's efforts depends upon the circumstances of the particular case. *In re Giorgianna H.*, 205 S.W.3d at 519.

The record shows that Mother was incarcerated for various drug offenses, probation violations and other offenses during the majority of the time the children were in DCS custody. While she was in custody she had access to parenting classes, NA (drug) and AA (alcohol) meetings, personal counseling and vocational classes, in which she either did not participate or did not complete. In addition, the record shows that, despite Mother's insistence that DCS merely gave her a list of agencies which could provide services to her, during those times when she was not incarcerated she sought out some of the agencies for assessments but failed to follow the recommendations, participate in treatment programs, or to attempt more than a token effort at doing the things necessary to reunite successfully with her children, including exercising visitation with them.

The evidence is clear and convincing that Mother's conduct, and not any deficiency in the efforts of DCS, was the cause of Mother's failure to comply with the requirements of the parenting plan. DCS identified specific areas of need and identified resources to address those needs, including those available to Mother while she was incarcerated, and Mother bears responsibility for failing to take advantage of the resources made available to her.⁵

B. Abandonment

The trial court held that Mother abandoned the children by wilfully failing to visit them or contribute to their support since they had been placed in DCS' custody and in the four month period prior to her incarceration, and by engaging in conduct prior to incarceration that exhibited a wanton disregard for the welfare of the children. Mother contends that the finding of abandonment based on failing to visit or support is error because "the proof at trial failed to establish a four month period during which she had not been incarcerated for all or part of the period" as contemplated by Tenn.

5

"The Department does not have the sole obligation to remedy the conditions that required the removal of the children from their parents' custody. When reunification of the family is a goal, the parents share responsibility for addressing these conditions as well. Thus, parents desiring the return of their children must also make reasonable efforts to rehabilitate themselves and to remedy the conditions that required the Department to remove the children from their custody."

In re Giorgianna H., 205 S.W.3d at 519.

Code Ann. § 36-1-102(1)(A)(iv)⁶ and that the four month period prior to incarceration must be a continuous one. Mother recognizes that abandonment can also be found if the parent is incarcerated at the time of filing of the petition and the parent has engaged in conduct prior to incarceration that exhibits a wanton disregard for the welfare of the children; she argues, however, that the evidence does not clearly and convincingly show wanton disregard of the welfare of the children on her behalf. We have determined that the record shows by clear and convincing evidence that Mother's activities which led to her various incarcerations exhibited wanton disregard for the welfare of the children and, consequently, that the trial court did not err in finding that she abandoned the children within the meaning of Tenn. Code Ann. § 36-1-113(g)(1).⁷

Tenn. Code Ann. § 36-1-102(1)(A)(iv) contains two tests for abandonment, both applicable where the parent is incarcerated at or near the time of the filing of the termination petition. *See In Re Audrey S.*, 182 S.W.3d 838, 865 (Tenn. Ct. App. 2005). As noted by the court in *In Re Audrey S.*:

The first test asks whether the parent has “wilfully failed to visit [,]... support [,] or ... make reasonable payments toward the support of the child for four (4) consecutive months immediately preceding such parent’s ... incarceration.” Tenn. Code Ann. § 36-1-102(1)(A)(iv). This test tracks the language of the first statutory definition of abandonment⁸ but shifts the focus from the four-month period immediately preceding the filing of the termination petition to the four-month period immediately preceding the parent’s incarceration. ... The second test asks whether the parent “has engaged in conduct prior to incarceration which exhibits a wanton disregard for the welfare of the child.” Tenn. Code Ann. § 36-1-102(1)(A)(iv). This test has no analog in the first statutory definition of abandonment, and it is not expressly limited to any particular four-month period.

In Re Audrey S., 182 S.W.3d at 865.

⁶ The statute defines abandonment, in relevant part, as follows:

A parent or guardian is incarcerated at the time of the institution of an action or proceeding to declare a child to be an abandoned child, or the parent or guardian has been incarcerated during all or part of the four (4) months immediately preceding the institution of such action or proceeding, and either has willfully failed to visit or has willfully failed to support or has willfully failed to make reasonable payments toward the support of the child for four (4) consecutive months immediately preceding such parent’s or guardian’s incarceration, or the parent or guardian has engaged in conduct prior to incarceration that exhibits wanton disregard for the welfare of the child.

Tenn. Code Ann. § 36-1-102(1)(A)(iv).

⁷ Our affirmance of the trial court’s holding in this regard pretermits our consideration of Mother’s alternative challenge to the trial court’s finding that she abandoned the children.

⁸ Tenn. Code Ann. § 36-1-102(1)(A)(i).

In the order terminating Mother's rights, the trial court found:

. . . that [Mother] engaged in conduct prior to incarceration as to exhibit a wanton disregard for the welfare of the children. Specifically, the Respondent's conduct was to engage in repeated drug usage and criminal activity whereby the mother continued to be incarcerated for convictions of Criminal Trespass, Criminal Impersonation, Possess or Casual Exchange of a Controlled Substance, Drug Paraphernalia, Possession for Resale of cocaine, and probation violations. The proof showed that [Mother] has not had a consecutive four (4) month period that she has not been incarcerated since the children have been in custody. [Mother] has shown a continued pattern of violating probation which has resulted in repeated incarcerations. The most recent incarceration has been extended by the additional conviction for Felony Escape due to [Mother's] escaping from prison.

Mother points to evidence of her participation in various programs, as well as "the Department's failure to assist her in dealing with her substance abuse issues and history of sexual victimization," as undermining the court's finding of wanton disregard. We respectfully disagree.

The factual history of this case, beginning with the circumstances surrounding the birth of M.A.S. and the petition for custody and emergency removal filed within a week of the birth and continuing through the circumstances leading to both children coming into DCS custody, lead to no other conclusion but that Mother's concern was not for the welfare of her children. Not only did she engage in the use and sale of drugs and other criminal activities on an ongoing basis prior to DCS receiving custody of the children, Mother left them with relatives who engaged in the same criminal behavior, causing one of the children to ingest methamphetamine, cocaine and ecstasy. To the extent there is any probative value in the proof of Mother's participation in programs made available to her while she was incarcerated, there is nothing to show any change in Mother's behavior after she was released from custody.⁹ It is well established that probation violations, repeated incarceration, criminal behavior, substance abuse, and the failure to provide adequate support or supervision for a child can, alone or in combination, constitute conduct that exhibits a wanton disregard for the child's welfare. *In re Audrey S.* 182 S.W.3d at 868 (citing *State Dep't of Children's Servs. v. J.M.F.*, No. E2003-03081-COA-R3-PT, 2005 WL 94465, at *7-8 (Tenn. Ct. App. Jan. 11, 2005) (perm. app. denied Tenn. Mar. 21, 2005); *In re C. LaC.*, No. M2003-02164-COA-R3-PT, 2004 WL 533937, at *7 (Tenn. Ct. App. Mar. 17, 2004). These elements are all present in this case.

C. Persistence of Conditions

Although not presented by Mother as an issue for review, DCS and the Guardian *Ad Litem* contend that the other ground found by the trial court, persistence of conditions, was supported by clear and convincing proof. We have reviewed the record and the proof fully supports the finding of the trial court in this regard.

⁹ Indeed, the record shows that Mother escaped from prison and was at large for several months.

D. Best Interest of the Children

Once a ground for termination has been proven by clear and convincing evidence, the trial court must then determine whether it is the best interest of the child for the parent's rights to be terminated, again using the clear and convincing evidence standard. The legislature has set out a list of factors for the courts to follow in determining the child's best interest at Tenn. Code Ann. § 36-1-113(i). The list of factors set forth in the statute is not exhaustive, and the statute does not require every factor to appear before a court can find that termination is in a child's best interest. *See In re S.L.A.*, 223 S.W.3d 295, 301 (Tenn. Ct. App. 2006) (citing *State of Tennessee Dep't of Children's Servs. v. T.S.W.*, 2002 WL 970434 at *3 (Tenn. Ct. App. May 10, 2002); *In re I.C.G.*, 2006 WL 3077510 at *4 (Tenn. Ct. App. Oct. 31, 2006)).

The trial court determined that termination of parental rights was in the best interest of the children. The facts in support of this finding, set forth in detail in the trial court's order, are fully supported by the evidence and record.

III. Conclusion

For the reasons set forth above, the decision of the Juvenile Court is AFFIRMED. Costs are assessed against Mother, for which execution may issue if necessary.

RICHARD H. DINKINS, JUDGE